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No. 94-552

In the Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL SCHNEIDER AND ROISIN SCHNEIDER, INDIVIDUALLY AND AS GUARDIANS OF SLAINE SCHNEIDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

The Military Claims Act, 10 U.S.C. 2735, provides that the military's resolution of claims for reimbursement shall be "final and conclusive" for all purposes, "[n]otwithstanding any other provision of law." The questions presented are:

1. Whether, in the absence of a sound constitutional claim, the federal courts lack subject-matter jurisdiction of a suit challenging the Secretary of the Air Force's resolution of a request for compensation under the Military Claims Act.

2. Whether the Secretary of the Air Force's resolution of petitioners' claim violated petitioners' Fifth Amendment rights to procedural due process or equal protection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-15A) is reported at 27 F.3d 1327. The opinion of the district court (Pet. App. 16A-25A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1994. The petition for a writ of certiorari was filed on September 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has enacted an interlocking set of statutory provisions governing injuries caused by military employees. The Federal Tort Claims Act (FTCA) governs claims brought for injuries caused by military employees when the claims arise in the United States. 28 U.S.C. 2671, 2680(k). For injuries caused by military employees outside the United States, two other statutes govern. The Military Claims Act (MCA or Act), 10 U.S.C. 2733, permits the branches of the military to compensate citizens of the United States for injuries caused by military employees in a foreign country, while the Foreign Claims Act (FCA), 10 U.S.C. 2734-2734b (1988 & Supp. V 1993), governs claims by inhabitants of foreign countries for injuries that take place outside the United States. The schemes are mutually exclusive. See 10 U.S.C. 2733(b)(2).

2. Under the MCA, a claim must be filed with the relevant military service within two years of the injury. 10 U.S.C. 2733(b)(1); 32 C.F.R. 842.4-842.6, 842.43, 842.45. The MCA provides that the Secretary of each service "may settle [] and pay in an amount not more than $100,000, a claim against the United States for * * * personal injury * * * caused by" a military employee of his service. 10 U.S.C. 2733(a). "Settle" is defined as "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance *or by disallowance.*" 10 U.S.C. 2731 (emphasis added). The Secretary of the Air Force has delegated his settlement authority in these matters by establishing a two-tiered review system, after which the decision of the Air Force is final. 32 C.F.R. 842.42(a)-(c), 842.52(d); see 10 U.S.C. 2733(a) (authorizing Secretary to promulgate regulations). The MCA provides that "*[n]otwith-*

standing any other provision of law, the settlement of a claim under section 2733 * * * of this title is final and conclusive." 10 U.S.C. 2735 (emphasis added).

3. Petitioner Michael Schneider was stationed with the United States Air Force in Great Britain, and resided there with his wife, petitioner Roisin Schneider, and their infant daughter petitioner Slaine Schneider. Pet. App. 2A. The Schneiders took their daughter to the United States Air Force Hospital in Upper Heyford, England, for treatment for her right ear. *Id.* at 18A. In 1989, an Air Force physician performed three surgical procedures on Slaine's ear. *Id.* at 2A. These procedures were unsuccessful. Later, a fourth procedure was performed by Dr. William S. Lund, a private physician. Slaine Schneider now suffers from permanent hearing loss in her right ear. *Id.* at 2A-3A.

In July, 1991, petitioners filed a request for compensation under the MCA, contending that Slaine's hearing loss was attributable to negligence by the Air Force doctor who performed the three surgical procedures. Pet. App. 3A. On March 17, 1992, following an investigation, the Secretary's designee denied petitioners' claim. *Id.* at 3A-4A. After reviewing the medical evidence (*id.* at 26A), as well as the qualifications of the physician (*id.* at 27A), the Air Force found that "there was no breach in the standard of care in the treatment Slaine received at our facility." *Id.* at 26A. It concluded that "without evidence of negligence the claim cannot be paid." *Id.* at 27A.[1]

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[1] Under most circumstances, in order for a claimant to secure compensation for a medical malpractice claim against a military doctor, the claimant must show negligence or wrongful conduct. 32 C.F.R. 842.49(a); see *Poindexter* v. *United States*, 777 F.2d 231, 235 (5th Cir. 1985).

Petitioners filed an administrative appeal and submitted for the first time the written opinion of their expert, who concluded that Slaine had received negligent care. Pet. App. 4A, 28A-36A. In May, 1992, the Air Force affirmed the initial denial of the claim. *Id.* at 37A-39A. The appellate officer stated that his review included an examination of all the evidence, "with special emphasis on the report of" petitioners' expert. *Id.* at 37A.

The appellate officer noted that petitioners' expert "cites * * * liberally" to Dr. Lund, who was the civilian surgeon who performed the fourth operation on Slaine. Pet. App. 37A, 4A. The appellate officer explained that "[d]uring the course of investigating this claim, Dr. Lund was extensively interviewed," and that he "stated in no uncertain terms that [the Air Force physician's] treatment of Slaine Schneider was not even close to medical malpractice." *Id.* at 37A-38A. The appellate officer explained that Dr. Lund's assessment was shared by other experts who reviewed the case. *Id.* at 38A-39A. Concluding that Slaine's hearing loss was "the result of the disease process and not medical negligence," the appellate officer affirmed the disallowance of petitioners' claim. *Id.* at 39A.

Petitioners filed suit in federal district court seeking review of the Air Force's denial of their claim. Pet. App. 4A. The complaint also asserted that the military claims process denied them due process and equal protection. *Id.* at 5A. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(1) and (6). Pet. App. 25A.

4. The court of appeals affirmed. Pet. App. 1A-15A. The court joined every other circuit that has addressed the issue in holding that the disallowance of a claim under the MCA is not subject to judicial review in the absence of a constitutional claim. *Id.* at 9A. The court of appeals also held that petitioners had failed to state any

valid constitutional claim. *Id.* at 9A-15A. It reasoned that Congress's decision to create different compensation schemes for torts committed abroad and those committed domestically did not violate the Equal Protection Clause because treating foreign tort claimants differently does not create a suspect classification and because Congress could rationally decide against subjecting government liability to the vagaries of foreign tort law. *Id.* at 10A. The court of appeals also found no due process violation because the Act creates no protected property interest in claimants. *Id.* at 12A. Senior Judge Heaney dissented on this last issue. *Id.* at 13A-15A.

ARGUMENT

1. Petitioners argue (Pet. 10-17) that the MCA does not manifest an intent to deny judicial review. However, the MCA, by its plain terms, precludes judicial review. Section 2735 reads: "Notwithstanding any other provision of law, the settlement of a claim under * * * this title is final and conclusive." 10 U.S.C. 2735.

Section 2735 was enacted in 1956 as part of the general recodification of the United States Code. Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 155. As described in the revision notes, see *United States* v. *National City Lines, Inc.*, 337 U.S. 78, 81 (1949) (revision notes are authoritative), Section 2735 combined the virtually identical language in three statutes governing claims against the military. 10 U.S.C. 2735 (Historical and Revision Notes); S. Rep. No. 2484, 84th Cong., 2d Sess. 173 (1956); H.R. Rep. No. 970, 84th Cong., 1st Sess. 163 (1955). Each of the predecessor statutes contained the phrase "for all purposes" following "final and conclusive." 10 U.S.C. 2735 (Historical and Revision Notes). Congress omitted this final phrase "as

surplusage," *ibid.*, and did not intend the omission to affect the text's substantive import. Act of Aug. 10, 1956, ch. 1041, § 49(a), 70A Stat. 640; S. Rep. No. 2484, *supra*, at 19-21; H.R. Rep. No. 970, *supra*, at 8-10. Accordingly, the statutory text should be construed as if it still read "final and conclusive for all purposes." See *Rodrigue* v. *United States*, 968 F.2d 1430, 1433-1434 (1st Cir. 1992).

Given this unambiguous language, every court of appeals to interpret the MCA's language has agreed with the court below that Section 2735 precludes judicial review of the military's disallowance of a claim under the Act. See *Hata* v. *United States*, 23 F.3d 230, 233 (9th Cir. 1994); *Rodrigue*, 968 F.2d at 1434; *Poindexter* v. *United States*, 777 F.2d 231, 233 (5th Cir. 1985); *Broadnax* v. *United States Army*, 710 F.2d 865, 867 (D.C. Cir. 1983) (per curiam); *LaBash* v. *United States Dep't of the Army*, 668 F.2d 1153, 1155 (10th Cir.), cert. denied, 456 U.S. 1008 (1982); *Towry* v. *United States*, 620 F.2d 568 (5th Cir. 1980) (per curiam) (adopting district court opinion, 459 F. Supp. 101 (E.D. La. 1978)), cert. denied, 449 U.S. 1078 (1981); see also *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) (interpreting similar language in one of the predecessors to the current MCA to foreclose judicial review). While petitioners rely (Pet. 11, 15-17) on this Court's presumption in favor of interpreting statutes to allow judicial review of administrative action, "[t]he presumption favoring judicial review of administrative action is just that—a presumption * * * [which] like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984).

In addition to the patently clear language noted above, the legislative history of the MCA indicates that Congress did not intend to permit judicial review. When

Congress first enacted the MCA in 1945, both the House and the Senate reports included a letter from the Acting Secretary of War stating that:

> In the absence of fraud or mistake in mathematical calculations, the findings of fact, conclusions of law, and the decision of the Secretary of War, or his designee, upon the merits of any claim, would not be subject to review by any other administrative or accounting officer, employee, or agent of the United States.

H.R. Rep. No. 237, 79th Cong., 1st Sess. 4 (1945); S. Rep. No. 276, 79th Cong., 1st Sess. 4 (1945). The legislative history of subsequent amendments to the MCA confirm Congress's intent to preclude judicial review.[2]

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[2] See, *e.g.*, S. Rep. No. 1056, 92d Cong., 2d Sess. 3 (1972) ("The effect of the provision as to finality is merely to provide that a final settlement is final *in the full sense of the word* and will not be subject to reopening as to that specific claim.") (emphasis added); H.R. Rep. No. 68, 92d Cong., 1st Sess. 2 (1971) (same); S. Rep. No. 1423, 88th Cong., 2d Sess. 9 (1964) ("*No provision is made for appeal to the courts.* On the contrary, the bill provides that the administrative settlement of a claim is final and conclusive.") (emphasis added).

It is also relevant that Congress used the same language that appears in Section 2735 in the National Guard Claims Act (NGCA), 32 U.S.C. 715. The legislative history of the NGCA reveals that Congress used Section 2735 as a model for 32 U.S.C. 715(g) to ensure that no judicial review of administrative proceedings would be permitted. H.R. Rep. No. 1928, 86th Cong., 2d Sess. 7 (1960) ("While it is not considered appropriate to grant *judicial* relief against the United States * * * it is considered appropriate to make provision for the *administrative* relief of such claimants to *the same extent as relief would be afforded under section 2733 of title 10.*") (emphases added); see *Rhodes* v. *United States*, 760 F.2d 1180, 1184 (11th Cir. 1985) (language in the NGCA precludes judicial review).

Given the MCA's plain language, consistent legislative history, and uniform court interpretations, the court of appeals correctly determined that judicial review of statutory challenges to a settlement under the MCA is prohibited.

2. Petitioners assert (Pet. 17-26) a variety of constitutional violations. Even if judicial review is available for such claims, cf. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 & n.12 (1986), the court of appeals correctly found them to be without merit.

a. Petitioners argue (Pet. 17-19) that Congress's creation of two different compensation schemes, the FTCA for torts committed domestically and the MCA and FCA for those committed abroad violates the equal protection component of the Fifth Amendment. Because no suspect classification or fundamental right is involved, this Court will not strike down such a difference unless petitioners can clearly demonstrate its irrationality. See *Kadrmas* v. *Dickinson Pubic Schs.*, 487 U.S. 450, 462 (1988). It is, however, rational and legitimate for Congress not to subject the United States to the vicissitudes of foreign tort law. See, *e.g.*, *United States* v. *Spelar*, 338 U.S. 217, 221 (1949); *Heller* v. *United States*, 776 F.2d 92, 98 (3d Cir. 1985), cert. denied, 476 U.S. 1105 (1986); cf. *Smith* v. *United States*, 113 S. Ct. 1178, 1181-1183 (1993). It is also rational for

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Petitioners contend (Pet. 12) that a letter appended to the 1972 Senate Report creates sufficient doubt to overcome Section 2735's plain language and to read a judicial review provision into the MCA. The 1972 letter, however, was commenting in response to specific concerns about General Accounting Office review, see S. Rep. No. 1056, *supra*, at 4; H.R. Rep. No. 68, *supra*, at 2-3, and is in no way inconsistent with reading Section 2735 to foreclose judicial, as well as administrative, review.

Congress to decide to utilize an administrative, rather than a judicial, process to settle claims arising against it in foreign countries.

b. Petitioners also claim (Pet. 19-26) that the Air Force denied them procedural due process. Assuming that petitioners were deprived of a constitutionally protected liberty or property interest, see *Board of Regents* v. *Roth*, 408 U.S. 564, 569-572 (1972), petitioners received all of the process they were constitutionally due. "The essential requirements of due process * * * are notice and an opportunity to respond." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 546 (1985). Petitioners had full notice of their claim's processing, submitted arguments and expert evidence through letters and written statements, and received decisions from the Air Force responding directly to their evidence and arguments. Petitioners have not identified any relevant information that either could not be or was not conveyed by them to the Air Force under the Air Force's procedures. Decisions of this Court and the courts of appeals recognize that due process does not always require an adversarial hearing or cross-examination, especially when the information collected is medical or scientific. *Mathews* v. *Eldridge*, 424 U.S. 319, 344-345 (1976); *Richardson* v. *Perales*, 402 U.S. 389, 402-403 (1971); *Hata*, 23 F.3d at 234; see also *Bohn* v. *County of Dakota*, 772 F.2d 1433, 1438 (8th Cir. 1985), cert. denied, 475 U.S. 1014 (1986); *Hanke* v. *Walters*, 740 F.2d 654, 656-657 (8th Cir. 1984).[3]

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[3] Cross-examination of witnesses or requiring the presence of counsel is often exceedingly difficult and expensive in the circumstances covered by the MCA. By their nature, MCA cases often involve servicemembers, experts, witnesses, and military officials who may all be located in different countries. In this case, for example, the petitioners were stationed in Italy, their counsel

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1994

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was in Minnesota, Air Force counsel was in Washington, D.C., and many of the experts and witnesses were in England.